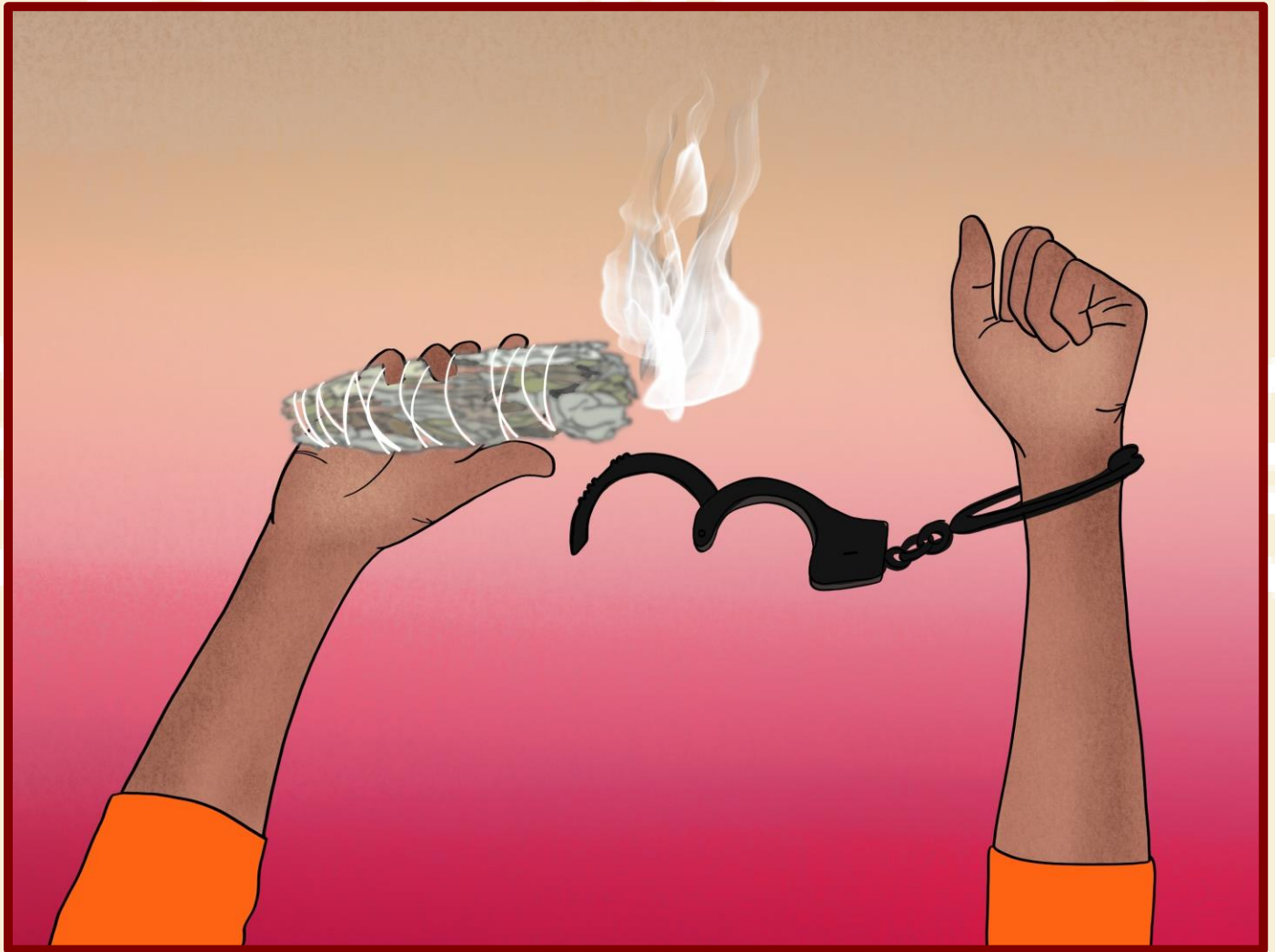


# JUVENILE DETENTION ALTERNATIVES INITIATIVE

## Examining How JDAI Sites Interact with Native Youth and Tribes



**Association on American Indian Affairs**  
November 2018



## **JUVENILE DETENTION ALTERNATIVES INITIATIVE**

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## **Acknowledgements**

The Association on American Indian Affairs is the oldest non-profit serving Indian Country protecting sovereignty, preserving culture, educating youth and building capacity. The Association was formed in 1922 to change the destructive path of federal policy from assimilation, termination and allotment, to sovereignty, self-determination and self-sufficiency. Throughout its 96-year history, the Association has provided national advocacy on watershed issues that support sovereignty and culture, while working on the ground at a grassroots level with Tribes to support the implementation of programs that affect lives on the ground. The Association is governed by an all-Native American Board of Directors from all regions of Indian Country that works in close cooperation with Native Americans, Tribal governments and other organizations with similar missions.

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## Executive Summary

Studies have shown that incarceration of youth does not reduce recidivism and often grooms youth to commit further crime. In fact, juvenile incarceration provides no overall benefit to public safety, wastes vast sums of taxpayer dollars, and exposes youth to alarming levels of violence and abuse.<sup>1</sup> The Juvenile Detention Alternatives Initiative® developed by the Annie E. Casey Foundation is a widely replicated and comprehensive detention reform effort that utilizes collaborative and data-driven approaches to reduce reliance on juvenile incarceration to create a fairer, more effective juvenile system that gives youth opportunities to develop into healthy, productive adults.<sup>2</sup>

This report – Juvenile Detention Alternatives Initiative: Examining How JDAI Sites Interact with Native Youth and Tribes – analyzes how Juvenile Detention Alternatives Initiative (JDAI) sites interact with Native youth and Tribes. The Association on American Indian Affairs (AAIA) developed a survey instrument, as well as targeted interviews to address how these JDAI sites identify Native youth, and whether the sites collaborate with Tribal governments and Tribal juvenile justice staff to provide culturally appropriate alternatives to detention and other opportunities for connections with Tribal communities.

Native American youth are the children of 573 federally recognized American Indian and Alaska Native Tribes and more than 200 other state recognized and non-recognized Tribal communities. The study and its findings are significant considering that the numbers of Native youth in detention are disproportionately higher compared to any other group. In 2013, Native youth had the highest rate of detainment for status offenses (19.5 per 100,000 youth) and drug offenses (19.2 per 100,000), as well as for technical violations (42.4 per 100,000) among all youth categories.<sup>3</sup> In addition, Native youth are at a higher risk of school discipline and suspension from school, abuse of alcohol and drugs, as well as attempting suicide. Native youth are more likely to be suspended or expelled from high school than any other racial group, excluding African Americans.<sup>4</sup> Up to 20% of Native youth ages 10-24 report attempting suicide each year – that is 2.5 times greater the national rate.<sup>5</sup>

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<sup>1</sup> “Juvenile Detention Alternatives Initiative 2014 Progress Report,” The Annie E. Casey Foundation, p. 4, accessed October 27, 2018, <https://www.aecf.org/m/resourcedoc/aecf-2014JDAIProgressReport-2014.pdf>.

<sup>2</sup> “Juvenile Detention Alternatives Initiative,” The Annie E. Casey Foundation, accessed October 26, 2018, <https://www.aecf.org/work/juvenile-justice/jdai/>.

<sup>3</sup> “Stemming the Rising Tide: Racial & Ethnic Disparities in Youth Incarceration and Strategies for Change,” Burns Institute, accessed October 27, 2018, [https://www.burnsinstitute.org/wp-content/uploads/2016/05/Stemming-the-Rising-Tide\\_FINAL.pdf](https://www.burnsinstitute.org/wp-content/uploads/2016/05/Stemming-the-Rising-Tide_FINAL.pdf).

<sup>4</sup> Daniel Losen, Cheri Hodson, Michael A. Keith II, Katrina Morrison and Shakti Belway, “Are We Closing the School Discipline Gap?” University of Central Los Angeles, accessed October 27, 2018, [https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap\\_FINAL221.pdf](https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf).

<sup>5</sup> “Fast Facts: Native American Youth and Indian Country,” Center for Native American Youth at the Aspen Center, accessed October 26, 2018, <http://www.cnay.org/resource-hub/fast-facts>.

Some scholars suggest that these disproportionate rates could be linked to inherent institutional racism toward these students, coupled with historic trauma, which arises out of 200 years of federal policies that worked to terminate, assimilate and dispossess Indian people from their lands, languages and cultures. Indian Tribes' relationships with the U.S. are unique and based upon centuries of treaties and federal laws. However, early federal law and policy declared Tribes and Native people as inferior, and federal policies reflected that by developing laws and policies that worked to destroy Native American land holdings and cultures through assimilation and taking away homelands. For example, as a primary assimilation tactic, the U.S. established hundreds of federal boarding and day schools located on and off Indian reservations, and even, to take away Indian children from their families and place them through adoption in non-Indian households. The goal was to "kill the Indian and save the man."<sup>6</sup>

Changes in federal Indian law and policy shifted in the late 1960s, eventually leading to the passage of two significant pieces of legislation. First, the Indian Self-Determination and Education Assistance Act of 1975 gave back Tribal control and self-determination of Indian schools by allowing Tribes to utilize federal dollars to run Tribal schools themselves.<sup>7</sup> Second, the Indian Child Welfare Act of 1978 (ICWA) was passed to protect against the removal of Native children away from their families and cultures. Today, ICWA is being challenged by groups such as the Goldwater Institute and a few state governments who continue to believe that Indian families and Tribes are not the best placement for Native children, though the facts show that it is state child welfare and juvenile justice systems that have failed Native youth.<sup>8</sup>

Even though some laws have changed, the current legal structure is burdensome, subjecting Native youth to three jurisdictions – federal, state and Tribal – and diverse juvenile justice systems for punishment. Tribal governments maintain criminal jurisdiction over some cases that occur within the boundaries of their lands and reservations when the defendant is Native. However, federal courts retain jurisdiction for certain major crimes, and states have jurisdiction over Native youth outside the reservation. In some cases, more than one of those jurisdictions may have concurrent jurisdiction over a youth who has allegedly committed a crime.

With this context in mind, this report was built on uncovering how JDAI sites work with Native youth and Tribes to support appropriate cultural alternatives to detention. The study identified two significant findings. First, the majority of JDAI sites who responded to the survey had not developed a reliable process for identifying and collecting data on Native youth. The majority of JDAI sites left it to the Native youth to self-identify as Native American or relied on the unilateral determination of a juvenile justice case worker to identify a youth as Native American. This is problematic as many Native youth do not want to alert their Tribal

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<sup>6</sup> Capt. Richard H. Pratt, "'Kill the Indian, and Save the Man': Capt. Richard H. Pratt on the Education of Native Americans," History Matters, accessed October 27, 2018, <http://historymatters.gmu.edu/d/4929>.

<sup>7</sup> 25 U.S.C. § 450.

<sup>8</sup> Rebecca Clarren, "A Right-Wing Think Tank Is Trying to Bring Down the Indian Child Welfare Act. Why? Native Americans say the law protects their children. The Goldwater Institute claims it does the opposite." The Nation, April 26, 2017, <https://www.thenation.com/article/a-right-wing-think-tank-is-trying-to-bring-down-the-indian-child-welfare-act-why/>.



communities because of concerns about anonymity and feelings of embarrassment or shame. Moreover, a caseworker may misunderstand that Native Americans vary widely in appearance, and may mistake a Native youth for Hispanic, black or white.

Second, the study revealed that the majority of JDAI sites surveyed were not reaching out to the youth's family or to the youth's Tribe to collect information on a youth's status as a citizen or member of a Tribe, were not providing notice to the Tribe of the youth's offenses, nor determining whether there were culturally appropriate services available to Native youth. Tribes are sovereign nations, often with their own culturally appropriate services, including alternatives to incarceration, to protect their youth. The Indian Child Welfare Act also mandates that, at least within a child custody proceeding where a status offense is involved, the Tribe must be notified and may have rights to transfer such a proceeding to the Tribal court. Thus, ICWA should provide a process by which states can work with Tribes to expand the resources available for Tribal youth. Tribal collaboration can only strengthen a JDAI site's opportunity to find alternatives to incarceration and achieve the important goals of JDAI.

Finally, the study identified emerging best practices within some JDAI sites in Arizona, Montana, New Mexico and Washington. These JDAI sites have developed programs that promote collaboration with Tribes, including changes to state laws and policies, procedures that require information sharing, juvenile code development, at-risk and former offender identification processes, culturally-relevant community service programming and even cultural awareness training for court staff and community partners.

Considering the historic trauma that Indian Country has experienced through the loss of lands, loss of control over their inherent sovereignty, destruction of their diverse cultures, and the violent taking of their children – which has manifested into alarming statistics of Native youth in trouble – AAIA has made six recommendations for JDAI sites to improve their work with Native American youth and Tribes:

**Recommendation 1:** Develop uniform and consistent protocols for identifying Native youth by Tribal affiliation, in collaboration with Tribes, that are not dependent on the youth's self-identification or a unilateral assessment based on physical characteristics. These protocols should include contact with the youth's family and building relationships with Tribes in the state.

**Recommendation 2:** Develop consistent data points to be collected regarding Native youth that includes Tribal affiliation, and base decision-making on the responsible collection of this data, in collaboration with families and Tribes.

**Recommendation 3:** Establish notification protocols, in collaboration with Tribes, for informing Tribes when a Native youth enters the juvenile justice system. The notification process developed as part of New Mexico law requires the state to notify Tribes when a Native youth is involved in a juvenile justice matter. ICWA legal standards for notification are much narrower but can be utilized and expanded to support a consistent notification process where Native youth appear before state courts including juvenile justice matters, not just child custody proceedings.

**Recommendation 4:** JDAI sites that regularly interact with Native youth populations should receive concentrated education and training to develop a deeper level of understanding about the circumstances, issues and needs of Native youth involved in the juvenile justice system, in partnership with Tribes and Tribal programs. Other JDAI sites should receive basic universal education about Native American youth and opportunities to support those Native youth.

**Recommendation 5:** States and Tribes should execute Memoranda of Understanding for all child welfare and juvenile justice matters. State court and juvenile justice staff should enter into process-driven agreements with Tribal juvenile justice staff and Tribal courts that include provisions regarding how to transfer Native youth to Tribal courts or to Tribal juvenile justice programs; how to identify Native youth; and how to access applicable programming and funding that supports Tribal cultures and traditions.

**Recommendation 6:** Explore the availability of relevant cultural programs and detention alternatives based on Tribal juvenile justice programs, as well as Tribal traditions and practices.

AAIA's report demonstrates that Native youth are subject to discrimination and are often inappropriately and excessively detained, mostly by state and local governmental services. It is imperative that JDAI sites reevaluate their understandings, as well as processes, about Native American youth to reduce instances of youth incarceration where there is little risk to public safety. This will require JDAI sites to develop effective methods of identifying Native youth and collecting information, in partnership with Tribes, and dramatically increase their collaboration with Tribal governments. We must work together to do better for our Native youth and our future generations.

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# I. INTRODUCTION: AMERICAN INDIAN AND ALASKA NATIVE YOUTH AND JUVENILE JUSTICE

The purpose of this report is to examine how Juvenile Detention Alternatives Initiative® (JDAI) sites<sup>9</sup> interact with Native American<sup>10</sup> youth as well as how those sites collaborate with Tribal governments and Tribal juvenile justice programs. The report gives critical information concerning the results of a survey and targeted interviews performed by the Association on American Indian Affairs with JDAI sites across the country. The survey and targeted interviews address how these JDAI sites identify Native youth, whether the sites provide culturally appropriate services to them, and whether the sites collaborate with Tribal governments and Tribal juvenile justice staff.

Started in 1922, the Association on American Indian Affairs (AAIA or the Association) is the oldest Native American policy and advocacy non-profit in the country whose goals are focused on protecting Tribal sovereignty, preserving culture, educating youth and building capacity. AAIA is chartered to develop culturally appropriate resolutions that build capacity to support cultural sovereignty and Tribal self-determination. AAIA is involved in national policy-making and provides training and technical assistance at a grassroots level, in partnership with Tribes throughout Indian Country, to strengthen the inherent sovereign rights central to the success of American Indian and Alaska Native peoples.

The Association has worked actively on Native children and youth issues for more than six decades. Tribal populations are composed of mainly young people with 42% under the age of 24; more than 2.1 million of the total Native population of 5.2 million.<sup>11</sup> Thus, the strength of the Native youth population is inextricably connected to the continuing cultural vitality and sovereignty of Native Nations and Tribes. If we do not protect our youth, Tribes will not be able to protect their diverse cultures and sovereignty.

In 2012, the AAIA partnered with the National Indian Child Welfare Association (NICWA) and approached the Annie E. Casey Foundation (Casey) to explore strategies that address the treatment of Native American youth in juvenile justice systems. That same year, “think-tank” sessions were held with juvenile justice experts, Tribal leaders and government entities, yielding recommendations for tackling this issue in Tribal and non-Tribal settings. One of the key recommendations that arose from those meetings included supporting the “Tribal Law and Order Act (TLOA) Long Term Plan to Build and Enhance Tribal Justice Systems” by

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<sup>9</sup> “Juvenile Detention Alternatives Initiative,” The Annie E. Casey Foundation, see note 2.

<sup>10</sup> The term “Native” is used in this report to include Indians and Alaska Natives that are from federally recognized Tribes as well as Native Americans that are from Tribes or Nations not recognized by the federal government. There are 573 federally recognized Tribes or Nations; there are approximately 200 Native groups in the U.S. that are not federally recognized.

<sup>11</sup> Paula L. Vines, Tina Norris, Elizabeth M. Hoeffel, Tina Norris, “2010 Census Briefs: The American Indian and Alaska Native Population,” United States Census Bureau, accessed October 27, 2018, <https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.



expanding the Casey's Juvenile Detention Alternatives Initiative (JDAI) to Indian Country.<sup>12</sup> As a result, Casey, in partnership with AAIA and the W. Haywood Burns Institute, is in the process of supporting the first Tribal JDAI site with the Mississippi Band of Choctaw Indians near Philadelphia, Mississippi. A second site has begun development in 2016 at the Pueblo of Isleta near Albuquerque, New Mexico.

JDAI is a widely replicated and comprehensive detention reform effort that utilizes collaborative and data-driven approaches to reduce reliance on juvenile incarceration to create a fairer, more effective juvenile system. JDAI was developed to support Casey's vision that all youth involved in the juvenile justice system should have opportunities to develop into healthy, productive adults. JDAI is not a program per se, but a process whose goal is to ensure that detention is used only when a youth presents a significant risk to public safety or a threat to not appear in court. JDAI focuses on the juvenile detention component of the juvenile justice system because youth are often unnecessarily or inappropriately detained at great expense, with long-lasting negative consequences for both public safety and youth development. Casey research finds that heavy reliance on juvenile incarceration will not reduce youth recidivism. Juvenile incarceration provides no overall benefit to public safety, wastes vast sums of taxpayer dollars, and exposes youth to alarming levels of violence and abuse.<sup>13</sup>

In summary, the objectives of JDAI are to influence policies, practices and programmatic changes that will:

- Eliminate the inappropriate or unnecessary use of secure detention;
- Minimize re-arrest and failure-to-appear rates pending adjudication;
- Ensure appropriate conditions of confinement in secure facilities;
- Redirect public finances to sustain successful reforms; and
- Achieve fair and equitable outcomes for all youth.

Since its inception in 1992, JDAI has become one of the nation's most effective, influential, and widespread juvenile justice system reform initiatives. As of 2017, JDAI was present in 39 states and the District of Columbia with 197 JDAI sites currently representing 300 jurisdictions.<sup>14</sup> These JDAI sites pursue eight interrelated core strategies to accomplish JDAI's objectives:

- ✓ Promote collaboration between juvenile court officials, probation agencies, prosecutors,

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<sup>12</sup> "Tribal Law and Order Act (TLOA) Long Term Plan to Build and Enhance Tribal Justice Systems," accessed October 27, 2018, <https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/tloa-tsp-aug2011.pdf>. See also "Indian Alcohol and Substance Abuse Interdepartmental Coordinating Committee: FY 2015 Annual Progress Report," United States Department of Health and Human Services, Department of the Interior, and the Department of Justice, accessed October 28, 2018 [https://www.samhsa.gov/sites/default/files/programs\\_campaigns/underage\\_drinking/iasa-coordinating-committee-annual-report-fy15.pdf](https://www.samhsa.gov/sites/default/files/programs_campaigns/underage_drinking/iasa-coordinating-committee-annual-report-fy15.pdf).

<sup>13</sup> "Juvenile Detention Alternatives Initiative: 2014 Progress Report," The Annie E. Casey Foundation, see note 1.

<sup>14</sup> "JDAI at 25: Insights from the Annual Results Reports," The Annie E. Casey Foundation, accessed October 27, 2018, <http://www.aecf.org/resources/jdai-at-25/>.

- defense attorneys, schools, community organizations and advocates;
- ✓ Use rigorous data collection and analysis to guide decision-making;
- ✓ Utilize objective admissions criteria and risk-assessment instruments to replace subjective decision-making processes to determine whether youth should be placed into secure detention facilities;
- ✓ Implement new or expanded alternatives to detention programs – such as day and evening reporting centers, home confinement and shelter care – that can be used in lieu of locked detention;
- ✓ Institute case processing reforms to expedite the flow of cases through the system;
- ✓ Reduce the number of youth detained for probation rule violations or failing to appear in court, and the number held in detention awaiting transfer to a residential facility;
- ✓ Combat racial and ethnic disparities by examining data to identify policies and practices that may disadvantage youth of color at various stages of the process, and pursue strategies to ensure a more level playing field for youth regardless of race or ethnicity; and
- ✓ Monitor and improve conditions of confinement in detention facilities.

Casey, with AAIA, seeks to address the unique needs of Native youth in the justice system; Native youth continue to be the recipients of actions and policies that create barriers to opportunity and success. The purpose of this report is to examine how current JDAI sites interact with Native youth as well as how those sites collaborate with Tribes. The report will review the results of a survey and targeted interviews with JDAI sites across the country concerning their interactions with Native youth and Tribes. The survey and targeted interviews address how these sites identify Native youth, whether the sites provide culturally-appropriate services to them, and whether the sites collaborate with Tribal governments or Tribal juvenile justice staff. Thus, this report is the beginning of an investigation to explore recommendations on how JDAI may better support Native youth.

However, before turning to the analysis of JDAI site interactions with Native youth and Tribes, it is important to understand the context of federal Indian law and policy generally, as well as how federal Indian law and policy has shaped Native youth programs – as well as statistics concerning Native youth – today. Unlike other ethnic and racial minorities, American Indians and Alaska Natives have a unique political status in U.S. law and policy. In addition, it is important to understand current issues facing Native youth, and the present and historical trauma that Native youth face.

## II. UNIQUE STATUS OF AMERICAN INDIANS AND ALASKA NATIVES

The complexity and context of the U.S.-Tribal relationship is important to understand when addressing any issue concerning Native youth. Treaties and other federal laws serve as formal expressions of the government-to-government relationship between Tribes and the U.S. government. From the earliest days of the country, the federal government has recognized a fiduciary responsibility towards Tribes and their citizens based on treaties and other federal laws. In the 1820s and 30s, Chief Justice John Marshall authored three watershed U.S. Supreme Court opinions that established foundational principles of the federal relationship in Indian affairs.<sup>15</sup> Justice Marshall's legal opinions recognized important Tribal rights, including inherent Tribal sovereignty and the right to self-governance; while at the same time those opinions called out the inferiority of Native American peoples.<sup>16</sup>

The goal of early federal Indian policy was to strip Tribes of their communally held lands and assimilate Tribal peoples. During early federal Indian policy development from the 1800s through the 1920s, federal law stripped control of education from Tribes and transferred primary control of Indian education to the federal government. The federal government established hundreds of federal boarding and day schools located on and off Indian reservations to “kill the Indian and save the man.”<sup>17</sup> Federal boarding schools tore families apart and stripped Tribal languages and cultures from Native youth. In 1928, the Meriam Report, funded by the Rockefeller Foundation, found that the U.S. implementation of Indian boarding schools was a failure. The federal government, over a period of time between the 1920-1970s, transferred control of many Native schools to churches and later to state public school systems in attempts to better Indian education.

In 1969, the Kennedy Report titled “Indian Education: A National Tragedy, and National Challenge,” gave a stinging critique of federal and state policies regarding Indian education and called for sweeping reforms in Indian education. The passage of the Indian Self-Determination and Education Assistance Act of 1975 was the first piece of legislation that recognized the importance of Tribal control and self-determination.<sup>18</sup> Today, the Self-Determination Act has allowed Tribal governments to achieve greater control over education of Native youth allowing Tribes to utilize federal dollars to run Tribal schools themselves. Federal laws also require equal access and equal resources for all Native students, irrespective of whether they attend school on or off the reservation.<sup>19</sup> Federal resources that are available specifically to Native students

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<sup>15</sup> Philip J. Prygoski, “From Marshall to Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty,” *The Compleat Lawyer*, Vol. 12, No. 4 (Fall 1995), pp. 14-17.

<sup>16</sup> Ibid.

<sup>17</sup> Capt. Richard H. Pratt, “‘Kill the Indian, and Save the Man’: Capt. Richard H. Pratt on the Education of Native Americans,” see note 6.

<sup>18</sup> 25 U.S.C. § 450.

<sup>19</sup> Stan Juneau, “A History and Foundation of American Indian Education Policy,” Montana Office of Public Instruction, accessed October 27, 2018, <http://opi.mt.gov/Portals/182/Page%20Files/Indian%20Education/Indian%20Education%20History.pdf>.

include tutoring, counseling, cultural programming, school supplies, and school lunches.

The Bureau of Indian Education currently oversees a total of 183 elementary and secondary schools located on 64 reservations in 23 states.<sup>20</sup> Of these, 53 are operated by the Bureau of Indian Education and 130 are operated by Tribes under Self-Determination Act contracts.<sup>21</sup> The Bureau also funds or operates off-reservation boarding schools and peripheral dormitories near reservations for students attending public schools. Of more than 600,000 Native students,<sup>22</sup> 41,051 attend Bureau of Indian Education day and boarding schools.<sup>23</sup>

However, Bureau of Indian Education Schools have been reported as failing Native youth and Tribes:

For over a century, the federal government has proven that attempting to control and oversee a nationwide network of schools leads to an ineffective and disheartening system of education that fails to address the cultural, linguistic, and overall learning needs of American Indian children. If the BIE's record of failure reflected on any other group of students, there would be a national outcry.<sup>24</sup>

In 2014, the General Accounting Office reported that the performance of students in Bureau of Indian Education schools "has been consistently below that of public school students, including other Indian students."<sup>25</sup> The report also stated that about one-third of BIE schools were in poor condition and would require \$1.3 billion to be made acceptable and another \$1 billion would be needed to deal with the BIE's backlog of maintenance and repair issues.<sup>26</sup>

Tribal schools (some of which are BIE schools), on the other hand, are more likely to incorporate Native cultures and languages into curriculums and school policies and therefore likely benefit Native students more than public schools that are absent of culturally relevant values and topics.<sup>27</sup> Moreover, school performance among Native youth is positively influenced by local knowledge, language and culture, as well as community involvement.<sup>28</sup>

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20 Education%20101/History\_FoundationAmindianEd.pdf.

20 "Schools," Bureau of Indian Education, accessed October 27, 2018, <https://www.bie.edu/Schools/index.htm>.

21 Ibid.

22 "The Federal Trust Responsibility to Native Education," National Indian Education Association, accessed October 27, 2018, <http://www.niea.org/wp-content/uploads/2016/03/NIEA-FY-2018-Budget-Updated-Sept-12-17.pdf>.

23 "Parents and Student," Bureau of Indian Education, accessed October 27, 2018, <https://www.bie.edu/Parents/Students/>.

24 Denise Juneau, "The Bureau of Indian Education is Broken," *Education Week* 37, no. 19 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4159099/>.

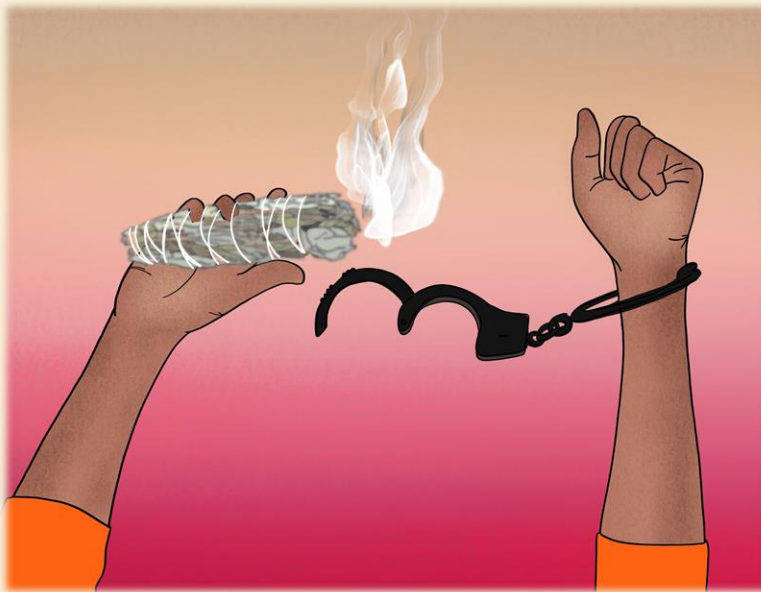
25 "Indian Affairs: Bureau of Indian Education Needs to Improve Oversight of School Spending," United States Government Accountability Office, accessed October 27, 2018, <https://www.gao.gov/products/gao-15-121>.

26 Ibid.

27 Devan M Crawford et al. "Tribal vs. Public Schools: Perceived Discrimination and School Adjustment among Indigenous Children from Early to Mid-Adolescence," *Journal of American Indian Education* 49, (2010) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4159099/>.

28 William Demmert, "Improving Academic Performance among Native American Students: A Review of the

Another holdover of historic failed federal policies and failing BIE school infrastructure is the removal of Native children from their families and communities and placement into non-Indian homes through the foster care and state adoption systems. Tribal families have been devastated by state and locally sanctioned child welfare and adoption agencies that have removed children from their homes at an alarming and disproportionate rate. AAIA completed two studies in 1969 and 1974 that exposed as many as 25-35% of all Indian children had been separated from their families and placed in foster homes, adoptive homes, or institutions, and 90% of those placements were in non-Indian homes – even when fit and willing relatives were available.<sup>29</sup>



As a result of AAIA's research and legislative drafting, as well as persistent Tribal advocacy and many hours of congressional hearings, the Indian Child Welfare Act (ICWA) was passed in 1978 recognizing the federal government's special fiduciary relationship to protect Indian children: "Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources. ... [T]here is no resource that is more vital to the existence and integrity

of Indian tribes than their children."<sup>30</sup> ICWA recognizes the inherent exclusive Tribal jurisdiction over Indian children domiciled on the reservation, Tribal jurisdiction concurrent with a state where the Indian child lives outside of the reservation, and the Tribal right to intervene in child custody proceedings. In addition, the Act requires state courts to work with Tribes to determine whether a child is an "Indian child."<sup>31</sup>

A keystone of ICWA is Tribal involvement in child custody proceedings involving Indian children, which may include issues of juvenile delinquency.<sup>32</sup> ICWA applies to a juvenile justice matter if a status offense is involved and placement of the child is required. A status offense is an offense that would not be considered criminal if committed by an adult and is prohibited only

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Research Literature," ERIC Clearinghouse on Rural Educational and Small Schools, accessed October 27, 2018, <https://eric.ed.gov/?id=ED463917>.

<sup>29</sup> H.R. Rep. No. 95-1386, 1978, accessed on October 28, 2018 <https://narf.org/nill/documents/icwa/print/app1.pdf>.

<sup>30</sup> 25 U.S.C. § 1901.

<sup>31</sup> 25 U.S.C. § 1903(4); see also 25 C.F.R. § 23.2.

<sup>32</sup> Stacie Polashuk, "Following the Lead of the Indian Child Welfare Act: Expanding Tribal Court Jurisdiction over Native American Juvenile Delinquents," *Southern California Law Review*, no. 69 (1996).



because of a person's status as a minor (such as possession of alcohol, truancy or incorrigibility). If a proceeding includes a status offense and "any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, pre-adoptive, or adoptive placement, or termination of parental rights," then ICWA will apply and the Tribe must be notified.<sup>33</sup> The Tribe will have concurrent jurisdiction with the state court or can utilize its right to intervene in a state court child custody proceeding at any time during the juvenile justice process for status offenses. However, ICWA does not enumerate Tribal intervention in the justice process for more serious charges that can be added on by the state, though inherent Tribal sovereignty dictates that it should.

The U.S. Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence found that "unfortunately, many states do not comply with the letter or spirit of ICWA."<sup>34</sup> Recent research suggests that in practice, this non-compliance comes in the form of state courts failure to partner with Tribes to identify the "Indian child" and to notify Tribes.<sup>35</sup> Fewer than half of states have passed laws that automatically trigger ICWA protections for status offenders, parents, and Tribes.<sup>36</sup> Only about 6.5% of all Tribes have a Tribal-State Agreement pursuant to ICWA that supports ICWA processes.<sup>37</sup> Non-compliance by state courts deprives Tribes of the right and ability to provide culturally relevant placements and services to their youth, and continues the inherent discrimination that has resulted in so many of the problems Native youth face.

Native youth continue to face a myriad of social, economic, and educational problems that are rooted in historical trauma brought on by centuries of failed federal laws and policies – and continued ignorance from state and local agencies that work with Native youth. Moreover, the struggles that Native youth face often go unmentioned in our nation's discussions about America's children. Unfortunately, when the needs of youth go unmet, those youth can develop behaviors that disrupt their development at home, in school and within their communities. For Native youth, negative behaviors (that may be the normal part of adolescent development) may turn into juvenile offenses that lead to incarceration at a higher rate than any other group.<sup>38</sup>

In 2013, Native youth had the highest rate of commitment for status offenses (19.5 per

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<sup>33</sup> U.S. Department of the Interior, *Guidelines for Implementing the Indian Child Welfare Act*, December 2016, pp. 12-14, <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf>.

<sup>34</sup> "Ending Violence So Children Can Thrive," US Department of Justice, accessed October 27, 2018, [https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending\\_violence\\_so\\_children\\_can\\_thrive.pdf](https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf).

<sup>35</sup> Ibid.

<sup>36</sup> Thalia González, "Reclaiming the Promise of the Indian Child Welfare Act: A Study of State Incorporation and Adoption of Legal Protections for Indian Status Offenders," *New Mexico Law Review*, no. 42 (2012), <https://ssrn.com/abstract=2658499>.

<sup>37</sup> Shannon Keller O'Loughlin, "A Survey and Analysis of Tribal-State Indian Child Welfare Act Agreements Including Promising Practices," Association on American Indian Affairs, accessed October 27, 2018, [https://www.indian-affairs.org/uploads/8/7/3/8/87380358/icwa\\_tribal-state\\_agreements\\_report.pdf](https://www.indian-affairs.org/uploads/8/7/3/8/87380358/icwa_tribal-state_agreements_report.pdf).

<sup>38</sup> Addie C. Rolnick, "Untangling the Web: Juvenile Justice in Indian Country," *Legislation and Public Policy* 19, no. 49 (2016).

100,000 youth) and drug offenses (19.2 per 100,000), as well as for technical violations (42.4 per 100,000) among all youth categories.<sup>39</sup> Native youth rates for out-of-home placements for these offenses increased, though the rates for other youth decreased.<sup>40</sup> There are several reasons for the overrepresentation of Native youth in the justice system:

Native youth are  
detained more than  
any other category  
of youth.

(1) Native youth have a higher incidence of risky activity than other youth; (2) harsh school discipline impacts Native students disproportionately; (3) racial disparities of the juvenile justice system result in more Native youth arrests, referrals, and detentions; and (4) multiple jurisdictions with authority over Native youth may create burdens on youth recovery.

Research shows that Native youth have a higher incidence of risky behaviors such as drug and alcohol use compared to non-Native youth, and Native youth begin using drugs and alcohol at an earlier age than non-Native youth.<sup>41</sup> Adolescent Natives have death rates 2 to 5 times the rate of whites in the same age group, resulting from a variety of risky behaviors.<sup>42</sup> Studies show that these risky behaviors and vulnerability also lead to gang involvement.<sup>43</sup> Violence, including intentional injuries, homicide and suicide, accounts for 75% of deaths for Native youth aged 12 to 20.<sup>44</sup> Suicide is the second leading cause of death for Native youth in the 15 to 24 age group.<sup>45</sup> in the U.S., up to 20% of Native youth report attempting suicide each year; suicide is the second

Suicide is the second leading cause of death among Native youth.

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<sup>39</sup> “Stemming the Rising Tide: Racial & Ethnic Disparities in Youth Incarceration and Strategies for Change,” Burns Institute, see note 3.

<sup>40</sup> Ibid.

<sup>41</sup> “Substance Use in American Indian Youth is Worse than We Thought,” National Institute of Health, accessed October 27, 2018, <https://www.drugabuse.gov/about-nida/noras-blog/2014/09/substance-use-in-american-indian-youth-worse-than-we-thought>.

<sup>42</sup> “Fast Facts: Native American Youth and Indian Country,” Center for Native American Youth at the Aspen Center, see note 5.

<sup>43</sup> Dawn McDaniel, “Risk and Protective Factors Associated with Gang Affiliation among High-risk Youth: A Public Health Approach,” *Injury Prevention: Journal of the International Society for Child and Adolescent Injury Prevention* 18, no 4 (2012), 253-8, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3406611/>.

<sup>44</sup> “Fast Facts: Native American Youth and Indian Country,” Center for Native American Youth at the Aspen Center, see note 5.

<sup>45</sup> “Suicide Among Racial/Ethnic Populations in the US: American Indians and Alaska Natives,” Suicide Prevention Resource Center, accessed October 27, 2018, <https://www.samhsa.gov/capt/sites/default/files/resources/suicide-ethnic-populations.pdf>.

leading cause of death among Native youth ages 10 to 24 – 2.5 times greater the national rate.<sup>46</sup>

In addition to the higher incidence of risky behavior and suicide, inherent bias results in Native students being disciplined more harshly in school. Between 90% and 95% of Native children are educated in public schools.<sup>47</sup> Yet, according to a 2017 report by the National Center for Education Statistics, Native graduation rates of approximately 72% remain the lowest of any racial/ethnic demographic group.<sup>48</sup> It is a known fact that minority children in public schools are generally subjected to harsher, more frequent disciplinary measures than white students.<sup>49</sup> Native youth are more likely to be suspended or expelled from high school than any other racial group, excluding African Americans.<sup>50</sup> These students miss valuable instruction time, making it hard to catch up even when they do return to school. Even more detrimental to their development is that suspensions and expulsions increase the likelihood that a student will soon become involved in the juvenile justice system.<sup>51</sup>

Native graduation rates  
remain the lowest of any  
racial or ethnic  
demographic group.

The disproportionate contact that Native youth have with the juvenile justice system reflects the broader national trend that shows these children are funneled out of public schools and into the juvenile and criminal justice systems.<sup>52</sup> Native youth are therefore being punished for negative behaviors developed due to poor social and economic conditions, which are the product of historic injustices faced by Native people and are beyond their control.<sup>53</sup> These circumstances

disproportionately push poorly served Native youth into the justice system where they are more likely to be subject to biases and harsher discipline than their non-Native peers.

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<sup>46</sup> Ibid.

<sup>47</sup> “Status and Trends in the Education of American Indians and Alaska Natives: 2008,” National Center of Education Statistics, accessed October 27, 2018, [https://nces.ed.gov/pubs2008/2008084\\_1.pdf](https://nces.ed.gov/pubs2008/2008084_1.pdf).

<sup>48</sup> “Status and Trends in the Education of Racial and Ethnic Groups 2016,” US Department of Education, accessed October 27, 2018, <https://nces.ed.gov/pubs2016/2016007.pdf>.

<sup>49</sup> “Civil Rights Data Collection Data Snapshot: School Discipline,” US Department of Education, accessed October 27, 2018, <https://ww2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>.

<sup>50</sup> Daniel Losen, “Are We Closing the School Discipline Gap?” see note 4.

<sup>51</sup> Sarah E. Redfield and Jason P. Nance, “The American Bar Association Joint Task Force on Reversing the School-to-Prison Pipeline Preliminary Report,” American Bar Association, accessed October 27, 2018, [https://www.americanbar.org/content/dam/aba/administrative/diversity\\_pipeline/stp\\_preliminary\\_report\\_final.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/stp_preliminary_report_final.authcheckdam.pdf).

<sup>52</sup> Ibid.

<sup>53</sup> Francine Sherman and Annie Balck, “Gender Injustice: System-Level Juvenile Justice Reforms for Girl,” National Crittenton Foundation, accessed October 27, 2018, [http://www.nationalcrittenton.org/wp-content/uploads/2015/09/Gender\\_Injustice\\_Report.pdf](http://www.nationalcrittenton.org/wp-content/uploads/2015/09/Gender_Injustice_Report.pdf).

In addition to historical injustices, Native youth also have a high rate of physical and mental disabilities. Professor of Public Policy at the City University of New York in Brooklyn, Byron Price, believes, “Among the most prevalent underlying issues are that many Native youth have learning disabilities, or histories of poverty, and would benefit from additional educational and counseling services.”<sup>54</sup> At 17%, the percentage of children and youth with physical, emotional, or learning disabilities was highest for Native youth in the 2013-14 school year, according to the National Center for Education Statistics.<sup>55</sup> Students of color, students with physical, intellectual, and learning disabilities, and students of color with disabilities experience disproportionate and harmful discipline at school.<sup>56</sup>

Native youth have the highest rates of physical, emotional and learning disabilities, and are more than twice as likely to receive out of school suspensions.

According to data from the U.S. Department of Education’s Civil Rights Data Collection, Native students with physical and learning disabilities are more than twice as likely to receive out of school suspensions compared to students without disabilities.<sup>57</sup> Among children with disabilities Native boys were more than twice as likely to receive one or more out-of-school suspensions, in comparison to white boys with disabilities. Native girls with disabilities were suspended around three times as often as white girls with disabilities.<sup>58</sup>

Suspending Native youth disproportionately reinforces and propagates historic inequalities for communities of color, low-income, and those living with disabilities. The result of this overuse of punishment is the overrepresentation of these same groups in the criminal justice system. Students who are forced out of the education system because of out-of-school suspensions or expulsions are up to ten times more likely to drop out, which significantly increases the likelihood of future incarcerations.<sup>59</sup>

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<sup>54</sup> Byron E. Price, “Humanizing Schools: Breaking Down the School-to-Prison Pipeline,” Huffington Post Blog, accessed October 27, 2018, [https://www.huffingtonpost.com/byron-e-price/humanizing-schools-breaki\\_b\\_2766834.html](https://www.huffingtonpost.com/byron-e-price/humanizing-schools-breaki_b_2766834.html).

<sup>55</sup> “Indicator 8: Students with Disabilities,” National Center for Educational Statistics, accessed on October 28, 2018, [https://nces.ed.gov/programs/raceindicators/indicator\\_rbd.asp](https://nces.ed.gov/programs/raceindicators/indicator_rbd.asp).

<sup>56</sup> “2013-2014 Civil Rights Data Collection: A First Look,” U.S. Department of Education Office of Civil Rights, pp. 3-5, accessed October 28, 2018, <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>.

<sup>57</sup> “Civil Rights Data Collection Data Snapshot: School Discipline,” United States Department of Education, see note 49.

<sup>58</sup> “2013-2014 Civil Rights Data Collection: A First Look,” U.S. Department of Education Office of Civil Rights, see note 56.

<sup>59</sup> “From School to Prison: Missouri’s Pipeline of Injustice,” ACLU Missouri, accessed October 27, 2018, <https://www.aclu-mo.org/en/missouris-pipeline-injustice-school-prison>.

While most young people are allowed to grow out of behavioral problems, Native youth are more likely to be arrested and detained than their white peers.

Most young people are allowed to grow out of these behaviors without getting entangled in the juvenile justice system. Yet, Native youth are more likely to be arrested and incarcerated for these behaviors than their white peers. Native youth are arrested at a rate of three times the national average, and 79% of youth in the Federal Bureau of Prison's custody are Native.<sup>60</sup>

In 2003, Native youth were 2.5 times as likely as white youth to be committed. By 2013, that ratio increased by nearly 50% to 3.7; in other words, Native youth are nearly four times as likely as white youth to be committed.<sup>61</sup> While Native students comprise less than 1% of the total public-school population, they make up 2% of school arrests and 3% of referrals to law enforcement.<sup>62</sup>

Native youth are more likely to be arrested and referred to courts – and are four times as likely as white youth to be detained.

One in four Native students in public school that are referred to law enforcement and subjected to school-related arrests have physical and learning disabilities.<sup>63</sup> Finally, once Native juveniles are arrested, they are referred to the courts at a much higher rate than white youth.<sup>64</sup> Thus, the perpetuation of inequality against Native youth and Native youth with disabilities makes it harder for them to get out of the juvenile justice system.

In addition to the disparities Native youth encounter, they also may be subjected to three jurisdictions for punishment – federal, state and tribal jurisdictions. Tribal governments maintain criminal jurisdiction over cases that occur within the boundaries of their reservations when the

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<sup>60</sup> Fast Facts: Native American Youth and Indian Country,” Center for Native American Youth at the Aspen Center, see note 5.

<sup>61</sup> Joshua Rovner, “Racial Disparities in Youth Commitments and Arrests,” Sentencing Project, accessed October 27, 2018, <https://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests>.

<sup>62</sup> “Civil Rights Data Collection Data Snapshot: School Discipline,” United States Department of Education, see note 49.

<sup>63</sup> “National Disproportionate Minority Contact Databook,” Office of Juvenile Justice, accessed October 27, 2018, <https://www.ojjdp.gov/ojstatbb/dmcd/b/>.

<sup>64</sup> Ibid.



defendant is Native. However, federal courts retain jurisdiction for certain major crimes within federal jurisdictions, which includes Tribal reservations and other federal and public lands. Outside Tribal and federal jurisdiction, state courts have jurisdiction over Native youth outside Tribal lands. In some cases, more than one jurisdiction may have concurrent jurisdiction when a youth has allegedly committed a crime.<sup>65</sup>

It is likely that the majority of Native youth interact with state jurisdictions more than federal or Tribal courts, since over 71% of the Native population lives off-reservation in urban areas. Often state courts and juvenile justice programs do not collaborate with Tribal communities nor do they utilize culturally appropriate programs that could help support Native youth. State and federal jurisdictions often fail to notify Tribal governments when a Native youth enters the juvenile justice system.

There is no aspect of Tribal sovereignty more important than protecting the well-being of children and youth. Current federal law offers some opportunities for state and local programs to connect with Tribes to determine whether culturally appropriate services, placements and funding may be available to assist Native youth in the juvenile justice system. The survey and targeted interviews discussed below provide information on the current scope of local and state efforts – through the JDAI initiative – to connect with Native youth and Tribal communities.



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<sup>65</sup> 18 U.S.C. § 1162 and 28 U.S.C. § 1360.

### III. ADDRESSING JDAI SITE EFFORTS WITH AMERICAN INDIAN AND ALASKA NATIVE YOUTH AND TRIBES

Outreach to JDAI sites around the nation began in the summer of 2016. AAIA developed a JDAI site survey and targeted interviews to determine the extent to which JDAI sites were interacting with Native youth and Tribes. Generally, the survey and interviews found that many JDAI sites do not collect information about whether they interact with Native youth and do not interact with Tribal governments. Of those JDAI sites that did show any interactions, most allow the youth to self-identify, or the juvenile intake staff makes a unilateral determination of race or ethnicity. In addition, the majority of JDAI sites do not provide for any special needs or culturally appropriate services for Native youth towards better outcomes, nor do they reflect current federal Indian policy, as well as child welfare policy supporting the connection of the Native youth to his or her community to increase the youth's successful transition out of detention.

#### A. SURVEY METHODOLOGY AND RESULTS

The survey was designed to ascertain both the extent to which each JDAI site was tracking its involvement with Native youth and whether JDAI sites were collaborating with Tribal governments or Tribal juvenile justice staff. The seven survey questions used to obtain this information were the following:

1. What local jurisdiction do you represent?
2. To your knowledge, are Native American youth referred to your juvenile justice system for detention?
3. Does your jurisdiction count the number of Native American youth that come in contact with the juvenile justice system?
4. If yes, how does your jurisdiction determine if the youth is Native American?
5. In your last calendar year, what percentage of your juvenile justice system intakes/arrests are Native American/Tribal Youth?
6. Has your jurisdiction developed any specific policies, protocols, practices or programs to explicitly address issues pertaining to Native American youth or Tribal governments?
7. Please describe the nature of the interactions with Tribal governments and their representatives with regard to Native American youth.

The survey was emailed via a third-party web-based provider to JDAI site representatives for all 197 JDAI sites representing 300 jurisdictions throughout the country. While participation in the survey by the sites was completely voluntary, a senior representative from the Casey JDAI Juvenile Justice Strategy Group did include an introduction in the email that encouraged the survey's completion. The survey was initially opened in August 2016 and held open for a two-week period.

Fifty-five JDAI sites responded to the survey in the initial two-week period. Following

that initial two-week period, a targeted list of sites that had not yet responded to the survey was developed. This targeted list was based on JDAI site proximity to areas with high Native populations. The survey was reopened and the sites on the targeted list were contacted individually by AAIA. The survey then received an additional nine responses during that second open period. Therefore, a total of 64 respondents returned the survey.<sup>66</sup>

JDAI site respondents represented various types of jurisdictions, including states, state probation agencies, judicial district courts, county courts, county consortiums, city courts and Tribal courts. This mix of geographic and political jurisdictions has presented obstacles in providing a clear, defined picture of what JDAI sites may be interacting with Native American youth and Tribes. In addition, some survey forms were not fully completed; however, those forms contained enough information to be useful for this report. Several survey forms were completed by multiple JDAI sites within one form. Thus, the 64 respondents may not coincide with 64 separate JDAI sites, and include state, county and judicial districts. Respondents were from 28 of the 39 states where JDAI is present. The Appendix to this Report lists the various jurisdictions that responded.

The reason for multiple jurisdictions within a JDAI site is that about ten years ago, Casey shifted to a state focused strategy. Before the shift to states, JDAI was replicated in just a few counties or judicial districts within a state. Under the new strategy, new sites are state jurisdictions that select counties to be engaged in JDAI. This new strategy has resulted in JDAI being implemented and replicated in nearly every county or judicial district within a particular state. However, the mix of geographic and political jurisdictions has presented obstacles in providing a clear, defined picture of which JDAI sites within a state are interacting with Native American youth and Tribes.

It is important to note that four Tribes responded, in addition to the state of Hawaii with information on their efforts with Native Hawaiian youth. It should be noted that three of the Tribal jurisdictions that responded are in Arizona where the Tribes have juvenile courts but are not designated as Tribal JDAI Sites by Casey. Further detail about these Tribal respondents are provided in the targeted interviews section regarding Arizona, below.

In summary, the survey results strongly indicate that most JDAI sites should better understand how to identify Native youth, and how to work with Tribal governments and Tribal communities to understand the presence of Native youth in the juvenile justice system. On the other hand, out of the 64 respondents, 12 of the JDAI sites demonstrated promising strategies for identifying Native youth, including adherence to ICWA Tribal notification standards (for status offenses) and maintaining contact with Tribes.

## **1. Processes for Identification of Native Youth**

Interestingly, 13 jurisdictions indicated that they did not serve any Native youth. These JDAI sites represented 6 states, 6 counties or parishes and 1 city jurisdiction. These counties or

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<sup>66</sup> The list of 64 JDAI Sites responding to the survey is described in the attached appendix.

states do have Tribes located within or nearby those jurisdictions. However, there is no data to understand how many Native youth may reside near these JDAI sites. However, several sites that stated they did not serve Native youth, including Massachusetts and Mississippi, have strong Native populations with defined reservations and communities.

When asked how the sites determine whether they maintain statistics about the number of Native youth referred to their juvenile justice system, the majority indicated a reliance on self-identification by Native youth. Only two sites requested or obtained a Tribal identification and one of those was a Tribal JDAI site. Only a handful of respondents contacted Tribal social workers, courts or other Tribal staff to determine whether a youth was Native. None of the sites stated that they discussed the youth's background with his or her family.

- 42 respondents indicated that they rely on self-identification by the Native youth;
- 3 of those respondents stated that they relied on self-identification and one other form of identification such as physical appearance or residence;
- One respondent indicated that they relied on self-identification to a police officer;
- 3 respondents determined identification solely on physical appearance;
- The Mississippi Band of Choctaw Indians determines identity based on residence, Tribal enrollment or use of Tribal services;
- 14 respondents stated that there were no Native youth served, though there was at least one Tribe in each respondent's county or state.



It is surprising that 42 respondents relied on Native youth to self-identify and did not have a developed process for identification and data collection, considering that Native Americans are overrepresented in the juvenile justice system.<sup>67</sup> The identity of Native youth should not be left to the youth to self-identify, or to a unilateral decision of the non-Indian social service or juvenile justice staff. Many Native youth do not want to alert their Tribal community because of concern about anonymity and feelings of embarrassment or shame. In addition,

non-Indian staff may misunderstand what a Native youth looks like, and may mistake a Native youth for Hispanic, black or white. JDAI relies on data order to carry out effective programming.

The respondents did not provide any information about contact with the families of a youth and whether questions of identity, culture, racial or ethnic background were discussed.

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<sup>67</sup> Rolnick, "Untangling the Web: Juvenile Justice in Indian Country," see note 38.

This is likely the first place juvenile justice staff could best understand the connection of a youth to a Tribal community and where additional alternatives to incarceration may be found.

Furthermore, most respondents stated that their JDAI site did not have any programs, practices or policies specifically addressing the needs of Native youth. This is the case even in counties with exceptionally high percentages of Native youth. These counties include Minnehaha County and Pennington County, South Dakota, both of which indicate that more than 20% of the youth in their program are Native.

However, 13 JDAI sites did state that they utilized Native-specific policies or programs. Specifically, a few of those 13, including JDAI sites from Orange County, California, Bernalillo County, New Mexico, and Clark County, Nevada, reported that they adhere to ICWA Tribal notification laws for Native youth status offenses. Status offenses are misbehaviors that are only illegal due to a person's age, such as running away, underage drinking, and truancy, and Native youth rates of status offenses are higher than any other group.<sup>68</sup> Since notification to the Tribe of a Native youth status offense is a legal requirement of ICWA when the status offense is part of a child custody proceeding, all jurisdictions must include Tribal notification for these status offenses according to federal law.

But to truly support Native youth, once a Native youth is properly identified, Tribal notification should be done for all offenses, regardless of whether ICWA mandates it; inherent Tribal sovereignty over their citizens should mandate notification to Tribes when any Native youth is in the state court system. Without such partnership with Tribes and Tribal Courts, a JDAI site will not be able to effectively address the Native youth they work with, potentially feeding into the historic harm of the past.

## **2. JDAI Site Collaboration with Tribes**

Of the 64 respondents, 20 stated that they have some type of process to work with Tribal governments.

- 20 respondents indicated that they have programs or procedures for working with Tribes or include Tribal representatives in advisory roles; and
- 12 of those 20 respondents indicated that their collaboration with Tribes was limited only to formal notifications, communication, or interaction in arranging custody and transfer.
- 6 respondents indicated that they are not collaborating with Tribes whatsoever; and
- 27 respondents gave no response regarding their level of Tribal collaboration.

There are a few examples from the targeted interviews, discussed below, that describe the collaborative interactions between JDAI sites and Tribal governments, including JDAI sites in Montana and counties in Oregon. As stated previously, ICWA requires notification to Tribes

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<sup>68</sup> Sarah Hockenberry and Charles Puzzanchera, "Juvenile Court Statistics 2014," National Center for Juvenile Justice, accessed October 27, 2018, <https://www.ojjdp.gov/ojstatbb/njcda/pdf/jcs2014.pdf>.



when an “Indian child” is part of a child custody proceeding for a status offense. Though not mandated by law in all juvenile justice matters, ICWA’s notice requirement could provide an already-developed process for notification between state jurisdictions and Tribes when a JDAI site is working with Native youth.

Providing broad notice to a Tribe whenever a local or state program is working with Native youth is an example of best practices in child welfare and is supportive of productive outcomes for Native youth. Broad notification that the JDAI site is interacting with Native youth will not only support that young person, the relationship with a Tribe could also make available significant culturally appropriate services and funding that the JDAI site may not have. Tribal collaboration can strengthen Native youth and the JDAI site’s opportunity to find alternatives to incarceration.

## **B. TARGETED INTERVIEWS METHODOLOGY AND RESULTS**

Twelve targeted JDAI sites were requested to participate in interviews. These 12 sites were targeted because of their geographic proximity to Tribal communities with a relatively high Tribal population. The interviews sought to gain additional detail of challenges and opportunities the JDAI sites may experience in the identification of Native youth and interacting with Tribes. The interview process also included a request to submit additional site-specific data.

Since each site targeted for an interview is part of state-led JDAI efforts, outreach initially occurred with state JDAI coordinators. State coordinators have knowledge about multiple in-state jurisdictions that participate in JDAI. They provided insights regarding state policies and practices, helped streamline responses to information requests, and identified the most useful information from local sites that have promising approaches to reducing the overrepresentation of Native youth in their system.

Altogether, four states were targeted:

- Arizona (specific focus on Pima, Maricopa and Gila Counties);
- Montana (specific focus on Cascade, Missoula, and Yellowstone Counties);
- New Mexico (specific focus on San Juan and Bernalillo Counties); and
- Washington (specific focus on Snohomish County).

JDAI coordinators in each of the targeted sites were asked to share the following site-specific quantitative information:

1. Number of referrals of Native youth, preferably disaggregated by type of offense (probation, delinquent versus non-delinquent, felony versus misdemeanor, status offense, etc.);
2. Percentage of the detention population that consists of Native youth;
3. Length of stay for Native youth (possibly compared with other racial and ethnic groups);
4. Percentage of Native youth on probation; and
5. Any other disaggregated data for Native youth and/or specific Tribe.

Additionally, the targeted requests sought to gather qualitative information about strategies, policies, programs, initiatives and agreements that are specifically focused on Native youth and Tribal governments. As with the surveys, the information submitted by the targeted JDAI sites was not always complete. However, the sites with the most complete and useful information are included here. Data from the Office of Juvenile Justice and Delinquency Prevention was used for those sites with little or no statistics submitted.<sup>69</sup>

## **1. Arizona**

The Pima County, Arizona JDAI site indicates that there is an ongoing partnership called the Native American Youth Collaborative, which works to address the needs of Tribal youth before the Pima County Court. The Collaborative consists of three Tribes in or near the County: the Gila River Indian Community, the Tohono O’odham Nation, and the Pascua Yaqui Tribe.

The Collaborative has written guidance regarding how the County system should handle identification when a Native youth is arrested for the first time. Specific questions are asked about the youth’s Tribal affiliation to parents or guardians. A Tribal representative confirms whether the identified youth is a Tribal member. That information is documented in a database. For those youths who are already known to the justice system as Native, the County shares a list of the identified youth with Tribes.

The Collaborative works together to share information. The three Tribes periodically share information on existing Tribal programs and procedures to the Pima County Court. Representatives from the Tribes also attend meetings, including probation sub-committee meetings where representatives from the Arizona Department of Children’s Services, attorneys, probation staff, behavioral health personnel, and others are present. Tribes are therefore able to inform the County and State social services about culturally appropriate services available through the Tribes, and protocols for coordinating with the Tribes.

Through the Pima County JDAI Site, the Tribes handle mostly status offenses, and avoid large numbers of their youth being detained in the County. In 2016, the three most common referrals of Native youth were status offenses (29.9%), drug-related offenses (21.9%), and Disturbance of the Public Peace (17.1%).<sup>70</sup> The average daily number of Native youth among the total detained population in 2017 was 7.54%, which is up from 4.2% in 2016. Finally, in 2016 the average length of stay for Native youth in detention was 21 days compared with a total average of 24 days for white youth.

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<sup>69</sup> This data was accessed through a website tool of the W. Haywood Burns Institute for Justice, Fairness, and Equity. It is an organization dedicated to using data to reduce racial and ethnic disparities in juvenile justice. Their interactive map shows disparities in detention and incarceration rates among youths of different racial and ethnic groups for 2015. <http://data.burnsinstitute.org/#comparison=2&placement=1&racess=2,3,4,5,6&offenses=5,2,8,1,9,11,10&year=2015&view=map>.

<sup>70</sup> “Juvenile Detention Alternatives Initiative,” Arizona Judicial Branch, accessed October 26, 2018, <http://www.azcourts.gov/jjsd/Operations-Budget/JDAI>.

## **2. Montana**

There are three JDAI sites in Montana: Yellowstone, Cascade, and Missoula Counties. Each site has a youth court with detention facilities. The sites state that Tribal collaboration occurs through the Montana Board of Crime Control. This Board oversees the State's JDAI sites and has a committee called the Youth Justice Advisory Council. This Advisory Council includes three individual Tribal representatives.

The Advisory Council has worked with Tribes to develop juvenile codes to regulate status offenses of Native youth. However, at this time none of the 12 federally recognized Tribes in Montana have adopted juvenile codes. The federally recognized Tribes in Montana include the Crow Tribe, Confederated Salish and Kootenai Tribes of the Flathead Reservation, the Blackfeet Nation, Chippewa Cree Tribe, Fort Belknap Assiniboiné and Gros Ventre Tribes, Fort Peck Assiniboiné and Sioux Tribes, Little Shell Chippewa Tribe and Northern Cheyenne Tribe. The Advisory Council is also looking into restorative justice practices in all district courts starting with Yellowstone County. Restorative justice practices are non-adversarial approaches to justice.

Despite the work of the Advisory Council, the statistics provided by these Montana JDAI sites demonstrate racial inequalities in the number of arrests and detentions of Native youth. In 2014 in Cascade County, 351 per 1,000 of total juvenile justice referrals were Native youth while 54 were white youth. That is nearly 6.5 times higher than white youth. In Missoula County, 111 per 1,000 of total referrals were Native youth and 53 were white, which is over 2 times higher. In Yellowstone County, 112 per 1,000 of total referrals were Native and 36 were white, which is 3 times higher.

Statistics for Native youth in detention are even higher. In Cascade County, 175 per 1,000 of total referrals were Native, 23 were white youth: 7.6 times higher. In Missoula County, 41 per 1,000 of total referrals were Native, 23 were white; and in Yellowstone County, 44 per 1,000 of total referrals were Native, 12 were white, or at a 3.6 times higher rate than white youth.

## **3. New Mexico**

There are 23 Tribes and Pueblos located within New Mexico. The state of New Mexico is the only state requiring Tribal notification in all juvenile justice proceedings where a youth may be detained.<sup>71</sup> This State law provides a higher standard than ICWA and is the only state that AAIA is aware of, that provides this level of notification. Specifically, the New Mexico law requires the identification of "an Indian child for the purpose of contacting the Indian child's tribe in delinquency cases" and that the state juvenile justice staff must "contact an Indian child's tribe to consult and exchange information for the purpose of preparing a predisposition report when commitment or placement of an Indian child is contemplated or has been ordered and indicate in the report the name of the person contacted in the Indian child's tribe and the results

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<sup>71</sup> N.M. Stat. § 32A-2-5, as amended by New Mexico Laws 1993, Chapter 77, Section 34.

of the contact.”<sup>72</sup>

In 2015, AAIA and NICWA drafted a report titled “New Mexico Juvenile Justice Tribal Notification Policy Research Project.”<sup>73</sup> This report discussed, among other things, the impetus for the New Mexico law. Even with high Native populations, it was unclear what Tribes were interacting with New Mexico JDAI sites. The lack of information on Tribal interaction with these sites has been an obstacle to any clarity on notification processes. New notification requirements were written with the collaboration of a task force and in consultation with Tribal governments.

However, despite this collaboration to develop the notification requirements, the Tribal notification processes for each county detention center in New Mexico have been applied inconsistently. For example, in Bernalillo County, there appears to be no protocol for notification to a Tribe regarding a Native youth’s involvement at the County at the time of detention, though the Tribe is notified at the time of arrest if Tribal affiliation is indicated in the law enforcement records.

In other counties, notification processes may be initiated if a youth appears to be Native. In San Juan County, Native identification is through self-identification or if the youth has already been recognized as a Native youth within the system. If a youth is not determined to be Native by appearance, self-identification or from previous contact, then identity may be established through case meetings or inquiries to Tribal judges. Once Tribal affiliation is confirmed, the youth’s identity with a particular Tribe is entered into the juvenile justice system database.

Further collaboration takes place at the State level with Tribes through Tribal representation on state governing bodies, such as the New Mexico Tribal-State Judicial Consortium. Equal numbers of Tribal and State judges represent the various Pueblos, Tribes, and New Mexico Courts in the Consortium. The Consortium works on many issues with cross-jurisdictional matters as the focus. The Consortium has a JDAI subcommittee that is developing a Tribal JDAI Model that can be incorporated into the overall JDAI Sites throughout the State of New Mexico.

The statistics for Native youth in the State of New Mexico demonstrate that there are a decreasing number of Native youth entering into the juvenile justice system. In 2014 in Bernalillo County, 31 per 1,000 of total referrals were Native and 17 were white. In San Juan County, 22 per 1,000 of total referrals were Native and 20 were white. The numbers of Native youth in detention in Bernalillo County were 22 per 1,000, and 16 were white, and in San Juan County, 17 per 1,000 of total referrals were Native and 20 were white.

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<sup>72</sup> N.M. Stat. § 32A-2-5(8) and (9).

<sup>73</sup> “New Mexico Juvenile Justice Tribal Notification Policy Research Project: Final Report,” The National Indian Child Welfare Association, accessed October 27, 2018, [https://www.nicwa.org/wp-content/uploads/2016/11/NM\\_JuvJustice\\_TribalNotificationPolicy\\_FinalReport.pdf](https://www.nicwa.org/wp-content/uploads/2016/11/NM_JuvJustice_TribalNotificationPolicy_FinalReport.pdf)

#### **4. Washington**

Snohomish County, Washington is a suburb of Seattle and a JDAI site. The Sauk-Suiattle, Stillaguamish, and Tulalip federated Tribes are located north of the County. This JDAI site has taken steps to establish collaborative relationships regarding Native youth who are at-risk or are already in contact with the justice system. However, there is no formal notification protocol with Tribes.

The relationship between the County JDAI site and the Tulalip Tribe centers on the local public-school system: the public high school, Heritage High, is located within reservation boundaries. Approximately 65% of Heritage High students are Native. There was a long-standing truancy issue (which is a status offense) among Native youth attending the high school. To address this issue and to assist at-risk Native youth, the Tribe has worked with the County juvenile justice system through community programming on Tribal lands. The County has programs to help high school age youth, including Native youth, obtain a GED. Additionally, the Tribe offers art and cultural programs to their youth.

The County and Stillaguamish Nation work together to develop community service programs that can serve as alternatives to detention, while maintaining culturally-relevant connections. Both the Nation and the County also work together to assist Native youth that must navigate the system of fines and fees associated with delinquent acts and justice system involvement.

Finally, Snohomish County has established cultural awareness training for its court staff and community partners. Given its close proximity to Tribal lands, this JDAI site recognizes that collaboration with Tribes is to be expected to provide appropriate services. However, though Native parents or guardians are notified when youth come into contact with the system, there is no formal Tribal notification protocol.

In Snohomish County in 2014, 87 per 1,000 of total referrals were Native, while 43 were white youth, and there was an increase of Native youth being referred to the juvenile justice system in 2015 and 2016. Domestic violence, truancy and at-risk youth charges filed (which are typically parent driven) accounted for 16% of the detention facility admissions who were Native youth (though only 1-2% of total population). Moreover, in Snohomish County in 2016, Native youth are 4-5 times more likely to be admitted to detention facilities compared to their white counterparts.



## IV. CONCLUSIONS AND RECOMMENDATIONS

The purpose of this report is to share findings and make recommendations about the scope of interactions between JDAI sites, Native youth and Tribal governments. The surveys and interviews conducted show that the majority of JDAI sites responding have not been collecting data on Native American youth, were not collecting data regarding Tribal affiliation, and were either relying on youth to self-identify as Native, or that juvenile justice staff made unilateral determinations on whether a youth was Native. Considering that JDAI relies on robust data collection to support the direction of alternatives to detention, these findings are problematic.

This report points to the need for JDAI sites, as well as the broader juvenile justice system, to understand how to identify Native youth. The first place to confirm a youth's identity is with his or her family. JDAI sites should also have valuable and consistent outreach with Tribes to understand culturally appropriate services, and better support the youth. Consistent collection of data over all JDAI sites would support the objectives of JDAI. Access to culturally-appropriate services as alternatives to detention further supports the objectives of JDAI and the juvenile justice system, as well as the goals of Tribal governments and Tribal families.



The socio-economic, physical, psychological and emotional issues facing Native youth are significant and pressing. The history of federal and Tribal relations, coupled with the negative impacts of continuous systemic, discriminatory practices and policies of public educational institutions and non-Tribal justice systems contribute to the disproportionate detainment rates of Native youth today. Failure to take an assertive and comprehensive approach to fully understand Native youth populations and obtain accurate data on those populations will only carry forward the wrongs of the past – jeopardizing the future of Native American populations.

JDAI sites and Tribes can work together within their regions to determine appropriate methods for collaboration and supporting Native youth. Based on the information collected by the survey and targeted interviews and considering the historic and reoccurring trauma Native youth experience, the Association on American Indian Affairs provides the following recommendations that will strengthen JDAI site involvement with Native youth and Tribes to change the destructive course of trauma, discrimination and detention, to culturally appropriate alternatives and healing. JDAI sites must:

**Recommendation 1:** Develop uniform and consistent protocols for identifying Native youth by Tribal affiliation, in collaboration with Tribes, that are not dependent on the youth's self-identification or a unilateral assessment based on physical characteristics. These protocols should include contact with the youth's family and building relationships with Tribes in the state.

**Recommendation 2:** Develop consistent data points to be collected regarding Native youth that includes Tribal affiliation, and base decision-making on the responsible collection of this data, in collaboration with families and Tribes.

**Recommendation 3:** Establish notification protocols, in collaboration with Tribes, for informing Tribes when a Native youth enters the juvenile justice system. The notification process developed as part of New Mexico law requires the state to notify Tribes when a Native youth is involved in a juvenile justice matter. ICWA legal standards for notification are much narrower but can be utilized and expanded to support a consistent notification process where Native youth appear before state courts including juvenile justice matters, not just child custody proceedings.

**Recommendation 4:** JDAI sites that regularly interact with Native youth populations should receive concentrated education and training to develop a deeper level of understanding about the circumstances, issues and needs of Native youth involved in the juvenile justice system, in partnership with Tribes and Tribal programs. Other JDAI sites should receive basic universal education about Native American youth and opportunities to support those Native youth.

**Recommendation 5:** States and Tribes should execute Memoranda of Understanding for all child welfare and juvenile justice matters. State court and juvenile justice staff should enter into process-driven agreements with Tribal juvenile justice staff and Tribal courts that include provisions regarding how to transfer Native youth to Tribal courts or to Tribal juvenile justice programs; how to identify Native youth; and how to access applicable programming and funding that supports Tribal cultures and traditions.

**Recommendation 6:** Explore the availability of relevant cultural programs and detention alternatives based on Tribal juvenile justice programs, as well as Tribal traditions and practices.

AAIA's report demonstrates that Native youth are subject to discrimination and are often inappropriately and excessively incarcerated. It is imperative that JDAI sites reevaluate their understandings, as well as processes, about Native American youth to reduce instances of youth detention where there is little risk to public safety. This will require JDAI sites to develop effective methods of identifying Native youth and collecting information, in partnership with Tribes, and dramatically increase their collaboration with Tribal governments. We must work together to do better for our Native youth and our future generations.

## APPENDIX

### List of JDAI Sites Responding to the Survey Including States, Counties and County Consortiums, Tribes and State Courts

#### A. STATES

1. Arizona
2. Arkansas: responded as having no interaction with Native youth. There are no federal or state recognized Tribes in this state and no statistics on the number of Native youth in this state.
3. Delaware: responded as currently having no interaction with Native youth. There are Tribal groups in the state, but no statistics on the number of Native youth in this state.
4. Georgia
5. Hawaii
6. Louisiana
7. Massachusetts: responded as having no interaction with Native youth. There are two federally recognized Tribes and six state recognized Tribes in the state.
8. Minnesota
9. Nebraska
10. New Jersey: responded as having no interaction with Native youth. There is one state recognized Tribe but no statistics on the number of Native youth in this state.
11. New Mexico
12. New York
13. Maine
14. Minnesota
15. Mississippi: responded as having no interaction with Native youth. The Mississippi Band of Choctaw Indians is a federally recognized Tribe located in and around Philadelphia, Mississippi and is the first Tribal JDAI site. However, juvenile justice experts involved with the Tribe state that no Native youth have ever been transferred to Tribal jurisdiction from the state.
16. Missouri
17. Montana
18. Ohio: responded as having no interaction with Native youth. There are two state recognized Tribes, however there are no statistics on the number of Native youth in this state.
19. Rhode Island
20. Washington
21. Wyoming

#### B. COUNTIES

1. Arizona, Cochise County
2. Arizona, Gila County
3. Arizona, Maricopa County
4. Arizona, Pima County
5. Arizona, Yuma County

6. California, Orange County
7. California, Santa Cruz County: responded as currently having no interaction with Native youth. Native youth population is not known for Santa Cruz County.
8. Georgia, Clayton County: responded as having no interaction with Native youth. There are three state recognized Tribes in the state, but Native youth population in Clayton County is unknown.
9. Iowa, Woodbury County
10. Louisiana, Caddo Parish
11. Louisiana, Calcasieu Parish: responded as having no Native youth interaction. There are four federally recognized Tribes in the state and 11 state recognized Tribes. However, Native youth population within this Parish is unknown.
12. Louisiana, Jefferson Parish: responded as having no Native youth interaction. There are four federally recognized Tribes in the state and 11 state recognized Tribes. However, Native youth population within this Parish is unknown.
13. Louisiana, Terrebonne Parish
14. Minnesota, Rice County
15. Montana, Mineral County
16. Montana, Missoula County
17. Nevada, Clark County
18. Nevada, Washoe County
19. New Mexico, Bernalillo County
20. Oregon, Central and Eastern Oregon Juvenile Justice Consortium (17 county consortium)
21. Oregon, Multnomah County
22. Oregon, Northern Oregon Regional Correctional Juvenile Detention (four county consortium)
23. Oregon, Wasco County
24. South Dakota, Minnehaha County
25. South Dakota, Pennington County
26. Texas, Harris County: responded as having no Native youth interaction. This county encompasses the city of Houston. There is a large urban Native population in this Houston. However, Native youth population is unknown.
27. Washington, King County
28. Washington, Pierce County: responded as having no Native youth interaction. There are 29 federally recognized Tribes in the state with 1 Tribe having headquarters within the county. Statistics of Native youth in the county, or Tribal programs for Native youth, are not known.
29. Washington, Snohomish County

### **C. Tribes**

1. Arizona, Ak-Chin Indian Community
2. Arizona, Gila River Indian Community
3. Arizona, Tohono O'Odham Nation
4. Mississippi, Mississippi Band of Choctaw

#### **D. Agencies and Courts**

1. Arizona, Juvenile Probation Department
2. Idaho, 4<sup>th</sup> Judicial District Court
3. Iowa, 3<sup>rd</sup> Judicial District Court
4. Louisiana, 32<sup>nd</sup> Judicial District Court
5. Louisiana, Houma City Court
6. Louisiana, Lake Charles City
7. Louisiana, New Orleans City: responded as currently having no Native youth present in their Site. Though there are four federally recognized Tribes in the state and 11 state recognized Tribes, it is unclear whether there is any interaction with Tribes.
8. Montana, 13<sup>th</sup> Judicial District Youth Court
9. Nebraska State Probation Administration
10. South Dakota State Court Services, 2nd Judicial Circuit